(1)

Supreme Court
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

SPEROS DRELLES, ET AL,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals abuse its discretion, and create a split between the Circuit Courts in finding that the District Court applied the correct legal standard in allowing the Specter Firm to profit in its role as administrator of an MDL document depository by employing a paralegal to do clerical document retrieval task at $75.00 per hour.

II. Did the Third Circuit err in finding that the District Court had subject matter jurisdiction to enter the Fee Order where state court litigants had opted-out of the MDL class action settlement; the Class action had settled prior to the document production for the state court litigation; the document depository had been closed for over one year and no application to re-open existed when the State Court compelled Metropolitan Life Insurance Company (hereinafter "MetLife") to produce discovery.

III. Did the Court of Appeals abuse its discretion in finding that the District Court did not deny the Behrend Firm Due Process by affirming the Magistrate Judge's decision that overruled the Behrend Firms's Objections to the Fee Application and grant of the fee request without a hearing.

PARTIES TO PROCEEDING BEFORE THE THIRD CIRCUIT

Other than the parties listed in the petition, the parties in the lower courts include Behrend & Ernsberger, P.C., Speros Drelles, Estate of James J. Donahue; Marie Drelles; Mary Catherine Gray; Howard Half; George Kresovich; Mildred Kresovich; Mary T. Lasko; Georgiana Toy; Kenneth Toy; Charles J. Abbott; Essie Adams; Marilyn Adams; Deborah Alston; John D. Antoniono Robert Armstrong; Patricia Augustine; Henry Augustine; Gay B. Banes; John T. Barley; John T. Barley Jr.; Barbara Barley; Paul Bauer; Richard Bauer; Madeline Bauer; Donald Beck; Kimberly Beck; Earl Braeudigam; Janice Braeudigam; Olive Mae Brick; Herman Brick; Kathleen Bryan; Andrew Bryan; Roosevelt Byrant; Carol Bronough; Amy L. Bucheit; Thomas Burtoft; Susan Burtoft; Anthony Calabrese; Sharon Calabrese; Samuel Caruso; Dolores Caruso; Clarence Claus; Margaret Claus; Sandra Clawson; Jennifer Peters; Rex Cole; Deborah Cole; Frank C. Contino; William E. Croft; Deborah A. Crook; David W. Cupec; Jerome Danenberg; Gertrude Danenberg; Robert Danenberg; Alvin Davis; Mary Davis; Andrew Denuzzio; Jean Denuzzio; Marian E. Desantis; Joseph Dilla; Kathleen Dilla; Kathryn A. Diodati; Wilheim Dorfner; Jacqueline Dorfner; Renee Drummond-brown; Nancy I. Eck; Earl Fairman; Jean Ferguson; Randall Ferrari; Harriet E. Fitts; Carol Frampton; Gilbert J. Frauenheim; Kathryn A. Gibson; Anthony E. Gill; Barbara M. Glover; Roy G. Goff; Albert Gotleib; Meryl Gotleib; Barry Governor; Mary Governor; Stanley Grabowski; Linda Grabowski; Dale Greenawald; Gloria Greenawald; Karn L. Gruver; Ronald J. Guiney; William A. Hafen; John P. Hammer; Margaret R. Hammer; Charles Harper; Irene Harper; Louise Harris; Sarah Hart; Stephen N. Havrilla, Jr.; John Helfrich; Nora Helfrich; John Hoffman; Lois Hoffman; Dolores Humenik; Edward Humenik; Steve Hyrb; Anna Marie Hyrb; John Irwin; Virginia Irwin; Dale Jackman; Constance Jackman; George Jackson; Margaret Jackson; Kenneth Jaros; Michael Johnson; Ruby Jones;

O'Neal Jones; Marlene C. Jones; Raymond E. Kalkbrenner; Frieda Kamel; Jordan Kampos; Sharon Lee Kampos; James Kasicky; Andrew Kasicky; Joseph Kizior; Dolores Kizior Mildred P. Koban; Mary Jo Kocheran-Dapos; Rosanna Kocian; Dennis Kocian; Rosanne Kocsis; George S. Kokus; Kenneth Kotewicz; Evelyn Kotewicz; James R. Krebbel; Sharon R. Kreuer; Barbara L. Krynevich; William V. Lacy; Donald Ladesik, Jean Ladesik; John R. Larkin; Diane Lebo; Ludmilla A. Luksik; William J. Luxon; Raymond Mackewich; Nancy Mackewich; James Marak; Bonita Marak; Marilyn E. Mervosh; Lillian Y. Merzlak; Frederick Meyer; Andrea Meyer; Ruth Miller; William Miller; Albert Minko; Ruth Minko; Thomas Moody; Micholas Moody; Jean Morse; Charles Murphy; Barbara Murphy; James M. Myers; James H. Myers; Tim McCarthy; Sandra McCarthy; Terrence McConnell; John McGarvey; Cindy McGarvey; John F. McRoberts; Bonnie Sue Neiderhiser; Mary Jean Nejak; Joseph Nist; Theodore Orlowski; Catherine Orlowski; Ronald Orr; Karlene Orr; Lillian Parrotto; William Perlinger; Crescenzo Petrilli; Randy A. Pfeifer; Raymond Piagessi; Roy D. Pirain; Mary Polonchak; Yvonne Blythe; Barbara J. Pond; Mary Jane Potter; Allan Randolph; Rosemary Randolph; Hanumantha Rao; Stashia Reeher; Judith E. Rockwell; Linda Romanelli; James Romanelli; Walter Rose; Alnetta Rose; Edward Rose; Mary Ellen Rose; Shirley Sachs; Frank J. Sampson; Helen G. Schablik; Charles Schu; Linda Schu; Eleanor J. Schultz; Thomas Sheridan; Kathleen Sheridan; Bonnie Sherwood; George Smith; Kathleen Smith; Donna Smorul-Kotlinski; Melvin Smulczenski; Lois Smulczenski; Mary Sparico; Samuel Spence; Presley Stahl; Elizabeth Stahl; Roberta Stallings; Preston Stitt; Adrienne Stitt; John D. Stokes; Ronald A. Stoltz; Rosemary Stoyanoff; David P. Sulkowski; Glen A. Sullivan; Richard L. Terhune; Gerard E. Terwilliger; Louise Thornton; Donald Toomey; Rita Toomey; Derrick J. Tuscano; Lucille Tyler; John Venus; Victoria Marie Veri; Thomas S. Vig; Rita Vig; Alvin Weinberg; Lisa Antin; Allen Wiltrout; Agnes Wiltrout; David Wise; Estate of Eddie Wright; Robert Yauch; Jennie Yauchkeith Younger; Brenda Younger and Appellees Metropolitan Life Insurance Co; Metropolitan Insurance

& Annuity Company, a Delaware Corporation; Gary Antonino; Joel Sherman; Ronald Shram; United Food and Commercial Workers International Association, AFL-CIO; Bruce A. Reznik Assoc; Jeffrey J. Rodgers; Robert Martini; Jonathon Holly; James Spangler; Steven Anastasia; Thomas M. Hyland; Christine Dovan; Jack E. Duckworth; Spector, Spector, Evans & Monague.

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BASIS OF JURISDICTION

This is an appeal from an Order entered January 12, 2004 by the Third Circuit Court of Appeals affirming the Order entered on August 29, 2002, by the United States District Court for the Western District of Pennsylvania, the Honorable Donetta W. Ambrose, affirming the former Magistrate Judge, Kenneth J. Benson's Memorandum and OrderS of August 6, 2002, and August 15, 2002 granting Specter, Specter Evans & Manogue, P.C.'s (the "Specter Firm") motion requesting counsel fees for the payment of services for document retrieval for state court litigation against MetLife from a document depository that had been established in a federal MDL Class action against MetLife.

On January 12, 2004 The Third Circuit entered an Order denying the Behrend Firm's Appeal. On February 17, 2004, Petitioners request for rehearing was denied by the third Circuit. Jurisdiction before the United States Supreme Court is proper under both Supreme Court Rule 10(a) in that the Third Circuit has entered a decision in conflict with the decisions of another United States Court of Appeals on the same important matter and Supreme Court Rule 10(c) in that the Third Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

STATUTES AND OTHER PROVISIONS INVOLVED

This petition involves questions presented under 28 U.S.C. § 1407 governing Multidistrict Litigation. Further questions are presented under Fed. R. Civ. P. 23 and the Fifth, Tenth and Fourteenth Amendments of the United States Constitution. The text of the relevant provisions is reprinted in the appendix to this brief.

STATEMENT OF THE CASE

This matter arises because a charge of $41,831.25, for retrieval

of documents for use in state court proceedings pursuant to a state court order compelling MetLife to produce documents. In compliance with the state court order, MetLife was compelled to make the documents available for inspection and review by counsel for plaintiffs' in the state court proceedings, the Behrend Firm. Under the state court's order, it was MetLife's choice to make the documents available for the state court litigation from the federal MDL document depository. It is this decision which has caused the problem resulting in this appeal.

Pennsylvania Rules of Civil Procedure, Rule 4009.1, 42 P.C.S.A., requires that a party make discovery documents available for inspection and copying. The charge for copying is borne by the party requesting the discovery. The cost of making the documents available is upon the party that has the documents in its possession. Thus, under the state rules, MetLife was responsible for the cost of making the documents available and the state court plaintiffs were responsible for the cost of photocopying.

In December 1999, prior to the document production in the state court cases in 2001, MetLife settled MDL 1091, a consolidated class action, filed in the United States District Court for the Western District of Pennsylvania. *See* In Re: Metropolitan Life Insurance Company Sales Practices Litigation, Misc. Docket No. 96-179, MDL No. 1091(1999).

As part of the settlement agreement, the expense of administering the document depository for the MDL was paid to the Specter Firm, and the depository was required to be kept open for one year after the settlement date. The Specter Firm, which was Co-Lead Counsel for Plaintiffs in the MDL, was responsible for administering the document depository.

MetLife, as was its right under the state court order, elected the manner in which it would comply with the state court discovery order, by informing the Specter Firm that it was designating certain

documents to be made available for the state court cases which were contained in the document depository. Even though the one year had elapsed for preserving the depository under CMO # 4, MetLife chose to use the document depository for production in the state court cases, pursuant to a procedure established in Case Management Orders #1 and # 4 entered in the MDL, which permitted the designation of documents by MetLife for production in individually filed cases in both federal and state court cases. (R. 284a and 311a)

In August of 2001, the Specter Firm hired an individual to start retrieving documents and making them available to the state court plaintiffs pursuant to MetLife's request. This individual began retrieving the documents, on a part-time basis[1]. Ultimately, this lead to the Specter Firm to submit a bill to the Behrend Firm for $41,831.25, representing its fee for partial production of the documents designated by MetLife based upon a charge of $75.00 per hour and 557.75 hours of work.

On September 25, 2001, the Behrend Firm forwarded the Specter Firm's invoice to MetLife, who declined to pay it. Memorandum and Opinion of August 6, 2002, p. 2. The Behrend Firm than filed a motion to compel in state court to have the documents produced at no cost, (save photocopying charges), which the state court granted on October 12, 2001. (R. 72a)

On January 28, 2002, the Specter Firm filed a motion in the District Court seeking an order directing the Behrend Firm to pay $41,831.25 in professional fees, representing paralegal time expended at $75.00 per hour to retrieve documents (Docket #898, Memorandum and Order, August 6, 2002, p.2.)

The Behrend Firm objected to the fee petition asserting three

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[1]The rate of production was less than satisfactory an ` resulted in delay in the state court cases and additional motions in state court, as set forth in detail, *infra.*

reasons why the Specter Firm's motion should fail: 1) the District Court did not have jurisdiction; 2) the procedure recommended by the Magistrate Judge contradicts the Pennsylvania Rules of Civil Procedure and thus, contradicts Case Management Order No. 4; and 3) in the alternative, if the court found it had jurisdiction, the procedure for charging for document retrieval violates the Pennsylvania Rules of Civil Procedure. The Behrend Firm further contended discovery should be permitted and a due process hearing should be held on the issue of whether the Specter Firm was making a profit, which is not permitted under C.M.O. No.4. The basis for this assertion was that the hourly rate charged by the Specter Firm was excessive for a file clerk, and that the Specter Firm mismanaged the document depository, causing delay in the state court cases and additional charges to the state court plaintiffs by the Specter Firm.

The Behrend Firm requested limited discovery and a hearing, to which the Specter Firm filed a reply. The Magistrate Judge refused a hearing and on August 6, 2002, granted the Specter Firm's Motion of Plaintiffs' Liaison Counsel for Order Enforcing Case Management Order No. 4, and directed the Behrend Firm to make payment in the amount of $41,831.25 to the Specter Firm.

The Behrend Firm filed for reconsideration before the Magistrate Judge, which was also denied. The Behrend Firm filed objections and appealed the Magistrate Judge's decisions to the District Court. The District Court adopted the Magistrate Judge's memorandum and Order and affirmed the Magistrate Judge on January 3, 2003. The Behrend Firm timely appealed this Order to the Third Circuit Court of Appeals.

On January 12, 2004 the Third Circuit entered Judgment for the Specter Firm finding that the Case Management Order authorizing reimbursement of the Specter Firm for the production of documents ("CMO #4) governed the production of the documents from the document depository and that the Specter Firm's proposed $75.00 hourly rate for document retrieval was

reasonable. The Third Circuit also determined that the District Court's failure to hold a hearing on this matter was not error.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. The Third Circuit's Holding Regarding the Ability of a Law Firms Ability to Charge for Servicing a MDL Depository is Contrary to the Law of Other Federal Circuits

In holding that the Specter firm could charge the appellants a "reasonable" rate for the retrieval of documents from the MDL depository, the Third Circuit has caused a split in the Circuits regarding the ability of the administer of an MDL document depository to profit from its court appointed position.

Prior to the Third Circuit's holding in this matter, the First Circuit had addressed the issue of proper reimbursable costs in a MDL case, holding that an administer of the MDL document depository should be permitted only to recover actual costs and not a profit as a result of their position. The First Circuit, relying on previous Fifth Circuit precedent involving "common benefit cases" held:

> In a "common benefit" case of this sort, therefore, the court must ensure that [ ] members **recover only their actual costs, with no "profit" margin**. *See* Fogelman v. Aramco, 920 F.2d 278, 286 (5th Cir. 1991) (**"To the extent that counsel charges more than actual cost for any service, be it reproduction of documents or telephone calls, counsel is recovering additional fees"**).; Spicer v. Chicago Bd. Options Exch., Inc., 844 F. Supp. 1226, 1260 (N.D. Ill 1993), In re Washington Pub. Power Suppy Sys. Secl Litig., 779 F.Supp. 1063, 1111-12 (D. Ariz. 1990) (reducing in-house photocopying costs claimed at twenty or twenty-five cents; **"[t]hat this amount may be charged to regular clients by the firm, or that is 'standard' in the firm's area of practice, is not**

controlling, [and] Class members will not be assessed an amount that produces a clear and unwarranted profit for the firm"), *rev'd on other grounds*, 19 F.3d 1306 (9th Cir. 1994).

In Re San Juan Dupont Plaza Hotel, 111 F.3d 220(1st Cir. 1997)(Emphasis added).

In focussing on the reasonableness of the fees charged to the Appellants by the Specter firm, the Third Circuit chose to ignore the fact that the $75.00 fee permitted the Specter firm to substantially profit from it administration of the MDL depository. The decision to permit the Specter Law Firm to profit from what essentially amounts to its role as a librarian is contrary to well established principles that where non-legal services are provided by a law firm, the law firm is prohibited both by case law and the Rules of Conduct from making a profit.

As the Third Circuit has explained: "We have cautioned on a number of occasions that when a lawyer spends time on tasks that are easily delegable to non-professional assistance, legal service rates are not applicable. We cannot condone "the wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals." Halderman v. Pennhurst State School & Hospital, 49 F.3d 939, 942 (3d Cir. 1995). The same holds true for the difference between a paralegal and a filing clerk. This Court cannot assess a hourly rate for tasks performed without considering the nature of the action. See Planned Parenthood, 297 F.3d at 266; Loughner v. University of Pittsburgh, 260 F.3d 175, 180 (3d Cir. 2001); Becker, 15 F. Supp.2d at 629. In other words, "[a] Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." Uric v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983).

What we have here is a very low level procedure: retrieving and refiling documents, nothing more occurred than this. To bill $75.00 per hour at a paralegal rate, for a filing clerk's work, is an improper

overcharge and clearly includes a very large profit far in excess of the actual cost of the labor for retrieving and refiling documents.

Indeed as recently as July 8, 2003, in an Eastern District Opinion[2], where fees were awarded in an 42 U.S.C. §1983 claim, the District Court limited charges for costs of clerical tasks in a fee petition matter to $50.00 per hour. See Wisdom v. Philadelphia Housing Authority, C.A. 02-cv-8369 (E.D. Pa. 2003)("Therefore, we affix the rate of $50.00 per hour to compensate Pileggi for clerical tasks such as filing a complaint and preparing subpoenas and faxes, and reduce his award accordingly.")

The $50.00 per hour rate in Wisdom, related to actual litigation costs, where some overhead profit is permissible, unlike the instant case where no profit and only the actual cost spent by the Specter Firm to have the documents retrieved is permissible.

The services provided by the Specter Firm occurred well after the MDL Class Action litigation was settled so that only document retrieval was involved. The charge should be based on the value of the service provided and the hourly rate should be justified. See Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago, 38 F.3d 1429, 1441 (7th Cir. 1994) (charges for in-house reproduction may not exceed the charges of an outside print shop). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993) (noting that counsel is "obliged to charge the client no more than the direct cost associated with the service (i.e. the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with provision of the service (**e.g. a proportional allocation of the salary of the photocopy machine operator**). **"It is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal**

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[2]The cost of living as well as the costs of running a law office in Philadelphia are higher than that of Pittsburgh.

services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." Id. (Emphasis added) See also Spicer v. Chicago Bd. Options Exchange, 844 F. Supp. 1226, 1260 (N.D. Ill 1993)("We do not believe that firms are entitled to run their photocopy operations as profit centers, and we do not believe that the charged rates reflect the actual costs to the firms." and **"Law firms have no right to make a profit off of incidental activities such as delivering documents."**)(Emphasis added)

As the Circuits are now split as to the ability of a law firm judicially appointed to oversee an MDL document depository to profit from its role, only review by this Court will ensure uniformity in the application of fees for retrieval of documents from an MDL depository for parties to the MDL or in related state court actions.

This split between the First and Third Circuits is of particular concern given the increasing prevalence of MDL cases in the federal courts. A review of the Panel for Multidistrict Litigation's docket reveals that there are currently approximately 207 MDL actions pending before the District Courts of the United States. As such, this case, and the split in the Judicial Circuits it has caused, presents an important question of federal law regarding the ability of a law firm charged with the maintenance of an MDL document depository to profit from its court appointed position which should be resolved by this Honorable Court.

II. The Third Circuit's Judgment Unlawfully Extended the Jurisdiction of the Federal Courts into Exclusively State Court Litigation.

1. The District Court Lacked Subject Matter Jurisdiction to enter the Fee Order since the state court litigants opted-out of the MDL Class Action

On August 18, 1999, the parties to the class action for which the MDL document depository at issue was created executed a Stipulation of Settlement that resolved all the claims alleged in the

class complaint.

The settlement class was certified pursuant to Fed. R. Civ. P. 23(b)(3), which requires that class members be given notice of a proposed settlement and an opportunity to opt-out of the settlement in order to pursue their own individual litigation against the class defendant. Several hundred Pennsylvania residents opted out of the class action settlement and decided to pursue their own individual actions in Pennsylvania State Court, as such they received no benefit from the class action litigation, and, by their decision to opt out removed themselves as party to the MDL action.

Approximately two hundred of the state court litigants who opted-out of the MDL settlement to pursue their own independent actions (hereinafter "the Opt-Out Litigants") are represented by the Behrend Firm, . The proposed settlement from MetLife (hereinafter "the Notice") describes in exhaustive detail the rights of individuals to exclude themselves from the MDL settlement. For example, in response to the question, "Am I a member of the class?," the Notice states:

> the proposed Class does **not** include persons or entities (unless such persons or entities are Class Members by virtue of their ownership interest in another Policy or Annuity) who have or had an ownership interest in Policies or Annuities that . . . they timely exclude from the Class . . .

(R. 329a)(emphasis in original). The Notice further advised class members that:

> * **You will not be bound, for the purposes of the Policy or Annuity you opt out of the proposed settlement, by any Orders or judgments entered in this case** if the proposed settlement is approved.

(R. 330a)(emphasis added). Then, in response to the question,

"What are the consequences of excluding myself from the Class," the Notice stated:

> **If you request exclusion from the Class:**
>
> * **you will not be eligible for any of the settlement benefits; and**
> * **you will not be allowed to object to the terms of the settlement; and**
> * **you will not be bound by any subsequent rulings entered in this case.**

(R. 331a)(emphasis in original).

The Release and Waiver set forth at the end of the Notice also made clear that a policyholder who timely excluded him or herself from the class would not be bound by the terms of the Release, the Settlement, or the Injunction:

> Notwithstanding the foregoing, **the Class shall not include** (unless and to the extent such persons or entities are Class Members by virtue of their ownership interest in another Policy or Annuity) . . . **any persons or entities who make a timely election to be excluded from the proposed class with respect to a particular Policy or Annuity.**

(R. 332a)(emphasis added).

As the notice specifically excludes the opt-out litigants from **"any Orders or judgments entered in [the MDL class action],** the District Court simply had no authority to award expenses for discovery pursuant to a state court order and the Pennsylvania Rules of Civil Procedure under the guise of the federal action, where, as here, the state court litigants had opted-out.

The District Court also ignored its own precedent wherein in the same MDL Class Action the Court previously held that it did not

have any basis to compel discovery production from the MDL document depository based upon a state court discovery order from an unconsolidated state court case filed in Butler County, Pennsylvania, prior to class certification in the MDL. (Subsequently, these state court litigants, the Maleskis, opted-out of the class settlement). The Butler County state court litigants, the Maleskis, who are represented by the Behrend Firm, had filed a motion, in the very same District Court which is the subject of this appeal, to compel production of documents from the federal document depository for use in their state court opt-out litigation. In denying the state court litigants' Motion to Compel Production of Documents, the District Court held:

> This court is not in the business of enforcing the orders of a state court. The state courts are quite capable of enforcing their own orders. ... Also, the [state court] order, ... does not direct MetLife to take any action concerning the document depository in this [federal MDL] case. ... Indeed, under the state court order, and, for that matter, under the CMO in this case, MetLife would be within its rights to produce the documents itself, rather than direct their release from the depository. ...
>
> * * * * *
>
> MetLife has been ordered by the state court to produce certain documents. There is no requirement in either the state court's order, or the CMO, that MetLife make production from the document depository. **This court has no basis upon which to grant the relief requested in the instant motion.**

Applying the same reasoning in the present matter should dictate the same result: the District Court lacked jurisdiction to exercise authority over the state court opt-out litigation.

This proposition is amply demonstrated by a recent decision of the Sixth Circuit in Becherer, et al., v. Merrill Lynch, 193 F.3d 415

(6th Cir. 1999) (*en banc)*, rejecting an attempt to enjoin claims filed by individuals who had opted-out of a federal class action and filed individual cases in Florida state court against the same defendant. The federal court granted summary judgment on the class's claims against the defendant and enjoined the opt-out litigants from pursuing their individual actions in state court. The Sixth Circuit reversed, holding that restricting the rights of opt-out litigants to pursue their own actions against the defendant would violate both Rule 23 and the due process clause of the U.S. Constitution. "Rule 23," the Court wrote, "mandates that these putative plaintiffs be allowed . . . to expressly exclude themselves or 'opt out' of the class. Binding the Florida plaintiffs to the [class action] judgment would surely defeat the purposes, if not the letter of Rule 23" (id. at 425), as well as the due process clause of the U.S. Constitution. *See* Id. at 426 (citing Shutts).[3]

A similar conclusion is mandated here. As in Becherer, allowing the Specter Firm to charge fees with respect to the Opt-Out Litigants state court discovery rights would render them "hostage to litigation" from which they chose to exclude themselves and "could not control." Neither Rule 23 nor due process could tolerate this result, which effectively would render the right to opt-out procedurally meaningless.

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[3] *See also* In re Transocean Tender Offer Securities Litig., 427 F. Supp. 1211, 1217 (N.D. Ill. 1977) (holding that Delaware court class action judgment for defendant cannot preclude class members who opted out of the Delaware class action from litigating claims against the same defendants in federal court: "[t]here can be no bar to the common law claims of the opt outs as these individuals have never had a right to litigate in a prior proceeding. This interpretation preserves the opt outs' right to a jury trial under the seventh amendment and, more importantly, protects their right to a day in court, a fundamental element of due process"). *Cf.* In re Telectronics Pacing Systems, Inc., 221 F.3d 870, 881 (6th Cir. 2000) (vacating certification of mandatory class action under Rule 23(b)(1)(B) on ground, *inter alia*, that depriving class members of the right to opt out of the class and pursue individual damages actions against the defendant would violate Rule 23 and due process).

Even without the strictures of Rule 23 and the due process clause, the requested fee expenses, through the guise of a filing a motion in federal court under the settled MDL class action, as opposed to filing a petition in the state court where the discovery order was entered that applied to all of the Allegheny County opt-out litigation, still would run afoul of basic principles of res judicata and collateral estoppel. Court after court has held that class members who opt-out of a class action settlement cannot be precluded from litigating their individual claims based on the judgment entered in the class action.[4]

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[4] *See, e.g.*, Becherer, 193 F.3d at 415 (holding that individuals who opted out of class action settlement could not be estopped from litigating their individual claims against the class defendant); In re Brand Name Prescription Drugs Antitrust Litig., 115 F.3d 456, 457 (7th Cir. 1997) (Posner, C.J.) ("[w]e begin with the opt-outs. Having opted out of the class action, they were no longer members of the class and so in no sense were parties . . .
The judgment [in favor of the defendants] will not have a preclusive effect on them, because they are neither parties, nor in privity with any parties, to the class action."); Lynch v. Merrell-Nat'l Laboratories, 830 F.2d 1190, 1192-93 (1st Cir. 1987) ("[e]stoppel should not be applied unless the plaintiffs had a fair and full opportunity to litigate. But the plaintiffs were allowed to think they could withdraw from [the MDL] and lose nothing. They did not have a fair opportunity when they understood that their withdrawal would not prejudice them. If they were now bound, the multi-district litigation would in effect have been a class action leaving the Lynches no true option.") (citations omitted); In re Corrugated Container Antitrust Litig., 756 F.2d 411, 418-19 (5th Cir. 1985) ("[a] class action judgment cannot be used to collaterally estop an opt-out plaintiffs' action against a defendant in a separate action. An opt-out plaintiff is not a party to the class action and is not bound by the class action judgment. The doctrine of collateral estoppel cannot bind a person who was neither a party nor privy to a prior suit."); In re Bendectin Products Liability Litig., 732 F. Supp. 744, 748 (E.D. Mich. 1990) (holding that individuals who elected not to join a federal MDL proceeding that resulted in a defense verdict were not estopped from litigating their individual cases against the same defendant); In re Transocean Tender Offer Securities Litig., 427 F. Supp. at 1217 (holding that Delaware court class action judgment for

All these cases make clear that the requested fee expenses violates the most basic principles of res judicata and collateral estoppel. Simply put, as non-parties to the class action, the Opt-Out Litigants cannot be bound by any of the terms of the class settlement or release.

2. The District Court Lacked Subject Matter Jurisdiction to enter the Fee Order since the Class Action had Settled, prior to the document retrieval for the state court actions

Consequently, since the class action was settled, the District Court lacks any power to issue orders concerning the state court opt-out litigation. Moreover, the settlement was finalized years ago; the claims period has expired, (deadline of November 2, 1999); (R. 328a) and by the final order, the document depository was to remain in existence for only one year the settlement of the class. All of the complained of activity took place more than one year after the class settlement and final order. Thus, there is no argument that the MDL settlement will be disrupted in any respect by the Opt-Out Litigants' pursuant of their individual cases, such that federal court authority still applies.

The present litigants herein represented by the Behrend Firm

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defendant does not preclude class members who opted out of Delaware class action from litigating claims against the same defendant in federal court; any other result "would permit defendants to circumvent principles of res judicata, collateral estoppel and the opt-out provisions of the Delaware class action rules, which are identical to Rule 23 of the Federal Rules of Civil Procedure."); Rebney v. Wells Fargo Bank, 269 Cal. Rptr. 844, 854 (Cal. Ct. App. 1990) ("[t]he settlement agreement permitted class members to opt-out of the settlement as to claims for monetary relief. CGA did so and is suing [the defendant] separately. CGA is therefore not even a party, much less aggrieved, with regard to the monetary relief aspects of the settlement").

opted-out of the proposed settlement and the jurisdiction of the court expired over the MDL Depository after one year beyond the final date. Neither MetLife nor the Specter Firm petitioned the District Court to extend the time of the District Court's jurisdiction beyond the one year time period. Accordingly, the Opt-Out Litigants and the Behrend Firm are not bound by later court orders regarding the class action and the document depository.

Indeed, where MetLife previously requested an injunction in the Metropolitan Life MDL, after settlement had taken place, to be entered against these very same Opt-Out Litigants, as a legal matter, the magistrate Judge agreed with the Opt-Out Litigants that a requested injunction by MetLife would "run[ ] afoul" of the Anti-Injunction Act. *See* Report and Recommendation dated August 15, 2002,at 8 (R. 340a). The Magistrate Judge, the exact same Magistrate Judge in the instant case, further observed that enjoining the Opt-Out Litigants in the manner requested by MetLife would impermissibly infringe on the opt-out rights guaranteed by Fed. R. Civ. P. 23(b)(3):

> These respondents opted out of the MetLife settlement. They had the right to do so. To permit the settlement and release to vest a right in MetLife that it can assert against non-settling plaintiffs, and so to limit or restrict those plaintiffs in the prosecution of state court suits, deprives them of the benefit of having opted out. The January 4, 2002 Report thus in a real way would convert this Rule 23(b)(3) class action into something it is not, and something MetLife has never suggested it is: a mandatory class action.

Id. at 8. (340a) Based on these observations, the Magistrate Judge concluded that the federal court lacked the legal authority to enter the injunction requested by MetLife. In short, the class action "settled" only the cases of those who stayed *in* the class.

The same logic applies herein to the Magistrate Judges' Order affirmed by District Judge Ambrose which ordered the Behrend

Firm to pay the fees requested fees requested in the Specter Firm Fee Application. The Class Action was settled, and the Case Management Order No. 4 requiring the documents to be maintained for one year expired without being extended by the Parties thereto. The class action authority does not apply to the opt-out state litigation since the class action was settled in 1999, and the state court discovery production for which the fee was incurred commenced in August of 2001, more than one year later, which was also after the document depository preservation order expired. Consequently, the District Court lacked any subject matter jurisdiction to order the Behrend Firm to pay the fee requested.

3. The Document Depository was Closed after one year after the settlement, and No Application to re-open it existed when the State Court compelled Met Life to produce discovery.

The Order of the Allegheny Court of Common Pleas Judge R. Stanton Wettick compelled MetLife to produce certain documents in the state court litigation. There is no requirement in either the state court's order, or the Class Action Case Management Orders ("CMO"), that require MetLife make production from the document depository.

After the time period for the maintaining the document depository expired, MetLife designated documents for production from the document depository in the Allegheny County opt-out state court litigation. The resultant charge by the Specter Firm for retrieving documents on MetLife's behalf after the time period for the District Court's retained jurisdiction over the document depository expired. Thus, the District Court simply has no jurisdictional basis upon which to grant the relief requested. Indeed, as set forth above, the District Court previously reached this very conclusion in denying a Butler County, Pennsylvania, opt-out state court litigant's Motion to Compel Production of Documents in the Maleski case, described previously.

The same reasoning applies herein since the Class Action settled in 1999, and the depository preservation order expired one year later. See Stipulation of Settlement XIX, General Matters, C, One Year after Final Settlement, ("... Plaintiffs and their counsel shall return to Defendants' Counsel all documents (and all copies of such documents in whatever form made or maintained. . .). Hence, the basis for the Federal District Court's exercise of authority, of the settled MDL Class Action, is moot as a basis to order the Behrend Firm to pay the cost of document retrieval for the state court discovery production associated with MetLife's decision to use the depository to respond to discovery orders in state court actions independent of the settled MDL Class Action.

Indeed, it is highly questionable whether the District Court had jurisdiction over state court Opt-Out Litigants for the purposes of document production, especially where such production was a result of MetLife's decision to produce the documents from the depository, and not the result of a request by the Behrend Fim on behalf of the state court Opt-Out Litigants.

The Allegheny County, Pennsylvania Court of Common Pleas Order which resulted in the August 2001 production from the depository, required MetLife to Produce Documents without specifying in what manner they would be produced. The state court left that option open to MetLife. Keeping in mind that Pennsylvania Rules of Civil Procedure Rule 4009.1, requires making the documents available for inspection and only requires the cost of copying the documents be borne by the party requesting the production. This is in direct contradiction to the CMO, which required the state court plaintiffs, who sought to have documents produced from the depository to pay the cost of making the documents available. Again, the state court Opt-Out Litigants herein, did not seek to have documents produced from the depository, MetLife chose to use the depository to produce the state court ordered discovery.

In the instant matter, MetLife opted to produce the documents

from the class action document depository after the state court compelled production of discovery documents. Accordingly, the burden of that election should rest on MetLife, rather than the Opt-out Litigants and the Behrend Firm who had no imput whatsoever on the manner MetLife chose to comply with the production order. It is unfair to compel the Opt-Out Litigants and the Behrend Firm to pay for MetLife's option to use the depository, particularly where the state rules of procedure do not require payment for the production of documents, the Opt-Out Litigants and the Behrend Firm had no choice in the matter, only MetLife had such authority. On motion by the Opt-Out Litigants, because of the extremely slow production of documents through the document depository, the Allegheny County Court of Common Pleas later ordered that MetLife produce the documents at no cost, without the use of the document depository which MetLife did[5].

4. The District Court Lacked Subject Matter Jurisdiction Over Discovery Procedures in Pennsylvania State Court Actions.

The authority the Magistrate Judge relied upon to take action in this matter was identified as being pursuant to the terms of Case Management Order No. 4 (C.M.O. No.4). Paragraph A of Section I. Applicability and General Provisions of Case Management Order No. 4 states:

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[5]As of November 2, 2001 the Liaison Counsel had only pulled documents from 100 pages of a 270 page list provided by Metropolitan Life and after the Court's Order of October 5, 2001 that the state court litigants did not have to pay to view the documents, only one box of documents was pulled. After the state court litigants went back to the state court because of the slow production, and order was entered compelling direction production by MetLife. MetLife produced the entire set of documents in 45 days. Thus, the Specter Firm in six months never completed the retrieval of the documents designated by MetLife to be produced from the document depository, which MetLife subsequently accomplished in 45 days.

> A. This Order shall apply to all actions against Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company, and any of their present or former affiliates, subsidiaries, employees, agents and/or sales representatives (hereinafter "Defendants"), **that have been or may hereafter be filed in, removed to or transferred to this Court** alleging violations of federal and/or state law based on allegations of fraudulent life insurance and related product sales practices and/or alleging that Defendants violated federal and/or state law in wrongfully terminating employees in connection with allegedly improper and fraudulent life insurance and related product sales practices. Discovery and pretrial practices and procedures in all such actions shall be coordinated and governed by this Order. . .
> (Emphasis added.)

The first problem that immediately surfaces and must be addressed, is whether or not any of the state court cases fit the requirements of C.M.O. No.4 as set forth in paragraph A. The simple answer is none of the cases fall into the categories set forth in Paragraph A. None of the Pennsylvania state court actions at issue in this matter have been filed in, removed to, or transferred to the District Court for the Western District of Pennsylvania.

The Magistrate Judge should not have looked any further and should have entered an order setting forth that the court lacks any authority to resolve this matter, as it did no the Maleski petition, (indentified, *infra*).

The finding by the Third Circuit that C.M.O. No. 4 could be a basis for jurisdiction, permitted a federal court to impose its will and/or interfere with the state rules of civil procedure and decisions in that state court proceeding.

The 10th Amendment of the Constitution of the United States reserves the rights of state courts. Amendment 10 states:

AMENDMENT 10–RESERVED POWERS TO STATES

> The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S.C.A. Const. Amend. 10

This Court has held that the states' legislatures retain all the powers to establish courts of justice, appoint judges, and make regulations for the administration of justice and that to do so is the peculiar and exclusive province and duty of the states' legislatures. See Calder v. Bull, 3 U.S. 386 (1798).

The District Court, and for that matter the Third Circuit, lacks the power to regulate the administration of justice in the Pennsylvania state court actions at issue in this matter. The regulations set forth in the Pennsylvania Rules of Civil Procedure governing the discovery procedures are to be followed in these cases, as in all Pennsylvania state court cases, and a federal court cannot interfere with the same. To do so is a violation of the 10th Amendment to the Constitution.

Discovery in the state court cases is under the sole discretion of the state courts and is subject only to the restrictions set forth by the state's rules of civil procedure. The Specter Firm's insistence that discovery of the documents sought in connection with the state court cases should be subject to any rule or order other than the state rules of civil procedure is a misstatement of the law.

5. Under Pennsylvania Law the Expense of Answering a Discovery Request Is Borne by the Answering Party.

The Pennsylvania Rules of Civil Procedure set forth the procedure for discovery in Pennsylvania state courts. Pa. R.C.P. No. 4009.1, 42 P.C.S.A. sets forth:

Rule 4009.1. Production of Documents and Things. General Provisions

> Any party may serve a request upon a party pursuant to Rules 4009.11 and 4009.12 . . . to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents. . .

Pa. R.C.P. 4009.1, 42 P.C.S.A.

Rule 4009.11 sets forth the procedure for parties serving request upon another party.

Rule 4009.11. Request Upon a Party for Production of Documents and Things

> (a) The request may be served without leave of court . . . and upon any other party with or after service of the original process upon that party.

Pa. R.C.P. 4009.11, 42 P.C.S.A.

Rule 4011 protects parties from discovery abuse. Pa. R.C.P. No. 4011, 42 P.C.S.A. states:

Rule 4011. Limitation of Scope of Discovery and Deposition.

> No discovery or deposition shall be permitted which
>
> (a) is sought in bad faith;
>
> (b) would cause unreasonable annoyance, embarrassment, oppression, burden or ***expense to the deponent or any person or party***; . . .

Pa. R.C.P. No. 4011, 42 P.C.S.A. (Emphasis added.)

Relief from unreasonable "expense" can be found in Rule 4012. Pa. R.C.P. No. 4012, 42 P.C.S.A. states:

Rule 4012. Protective Orders

(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:

(1) that the discovery or deposition shall be prohibited;

(2) that the discovery or deposition shall be only on specified terms and conditions, including a designation of the time and place;

(3) that the discovery or deposition shall be only by a method of discovery or deposition other than that selected by the party seeking discovery or deposition;

(4) that certain matters shall not be inquired into;

(5) that the scope of discovery or deposition shall be limited;

(6) that discovery or deposition shall be conducted with no one present except persons designated by the court;

(7) that a deposition shall be sealed and shall be opened only by order of the court;

(8) that the parties simultaneously shall file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(9) that a trade secret or other confidential research, development or commercial information shall not be

disclosed or be disclosed only in a designated way.

(b) . . . If the motion for protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Pa. R.C.P. No. 4012, 42 P.C.S.A.

The Pennsylvania Rules of Civil Procedure do not provide relief from the expense of responding to discovery by shifting the expense to the requesting party. Case Management Order No. 4 XII C, upon which the Third Circuit relied in upholding the District Court order granting the Specter Firms Motion, states:

> C. Counsel for any plaintiff obtaining documents from Defendants or the document depository as set forth above shall pay the expenses of Defendants or Plaintiffs' Liaison Counsel in producing the document, including reasonable copying costs, and shall be subject to the Orders of this Court regarding the use of those documents. Nothing in this Order shall be construed to require that the Federal Rules of Civil Procedure govern the scope of any discovery response or request in any state court actions.

As Case Management Order No. 4 XII C shifts the expense of making the documents available to the requesting party, it is contrary to Pennsylvania law. The federal courts have not been provided authority in discovery matters taking place in a state court proceeding to supercede the will and intent of the Pennsylvania legislature as set forth in the Pennsylvania Statutes and found in the Rules of Civil Procedure and contradict the Orders of the state court judge and contradict the Rules of Civil Procedure.

Case Management Order No. 4 XII B 2 and C are contrary to the discovery procedures set forth in the Pennsylvania Rules of Civil Procedure and can not supersede the same. Thus cannot be

enforced against the state court Plaintiffs.

6. The District Court Lacked Personal Jurisdiction since neither the Behrend Firm, nor the Opt-Out Litigants it represents are Parties to the MDL Class Action

Case Management Order No. 1, specifies that all parties to be designated by "Caption - All Parties." (291a - 292a). The Behrend Firm by definition of the Case Management Order No. 1 was not a party to the MDL settlement class and was not identified or listed as such. The Opt-out Litigants, represented by the Behrend Firm also were not parties as they opted-out of the settlement class.

Despite the fact that the Case management Orders do not grant the District Court jurisdiction over the Opt-out Litigants or the Behrend Firm, the District Court determined that it had jurisdiction and could award the expense of making documents available for inspection and review in state court cases, even though neither the state court, nor the Pennsylvania Rules of Civil Procedure permit the award of the expense of making documents available for inspection and review. The Third Circuit's decision to uphold this ruling was error and should be reviewed by this Honorable Court.

This Court has long recognized that lower federal courts cannot sit in direct review of state court rulings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923); District of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 482 n.16 (1983). Likewise, there is a "strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) (citing Younger v. Harris, 401 U.S. 37 (1971)). Under these doctrines – known as "Rooker-Feldman" and "Younger" abstention, respectively - the District Court in an earlier ruling in the Metropolitan Life MDL litigation, as to a motion filed by a state court litigant, the Maleskis, to compel production from the document depository, ultimately concluded the Magistrate Judge lacked authority to compel

production of documents from the document depository as that was an issue to be decided by the state court, *see supra*.

Using the same reasoning, the District Court lacks authority to order the Behrend Firm, as representative counsel for the Opt-Out Litigants in the state court cases, to pay the purported expenses of Specter Firm as Co-Lead Plaintiffs' Counsel since the Class Action was settled in 1999, and the one-year document depository order period had lapsed without any agreement by the Parties to extend it. This is particularly the case where the Behrend Firm was forced to use the depository at the direction of MetLife, in order for MetLife to comply with the production order in the state court litigation. The Behrend Firm was not a party in interest but a representative of the plaintiffs in the state court actions. Thus, there is no continuing jurisdictional authority once the Class Action was settled and the Document Preservation Provision, in Case Management Order No. 4 expired for the Court to hold the Behrend Firm directly liable for these expenses.

III. The Third Circuit Erred in Permitting the District Court to fail to Provide a Mandatory Due Process Hearing

The Definition of the Class excludes the present state court Opt-Out Litigants and their counsel, the Behrend Firm, as parties to the MDL Litigation. *See* Class Notice, Part B Description of the Class. (329a)

Where, as here, there is a dispute as to the amount of fees awarded, relating to both the rate charged and the hours claimed, the Third Circuit Court had previously held that a hearing is mandatory. The District Court erred as it failed to have an evidentiary hearing once it learned the fee rate and hours were in dispute. Priro to its decision in the instant case, the Third Circuit had repeatedly and consistently held that in a fee petition dispute, as in the instant case, where there is a dispute as to the fee rate and the hours charged, there must be a hearing. *See* Planned Parenthood, Cent NJ v. The

Atty. Gen., 297 F.3d 253, 267 (3rd Cir. 2002)("[I]f 'hourly rates are disputed, the district court must conduct a hearing to determine the reasonable market rates.' [citing to] Smith v. Philadelphia Housing Auth., 107 F.3d 223, 225 (3d Cir. 1997); *see also* Lanni v. State of N.J., 259 F.3d 149, 149 (3d Cir. 2001)"). The same standard applies to costs[6]. *See* Loughner v. University of Pittsburgh, 260 F.3d 175, 181 (3d Cir. 2001) ("Attorneys' fees and costs are frequently analyzed together, so the same standards apply to our review of costs as to our review of attorneys' fees.")

Should this Honorable Court find Case Management Order No. 4 controlling in this matter, which Pennsylvania state court plaintiffs deny, Case Management Order No. 4 XII C permits recovery of **"expenses"** only and not professional fees or profit. Expense as defined in Black's Law Dictionary, (7th ed. 1999) includes expenditure of money, time, labor, or resources to accomplish a result.

It is a violation of the Pennsylvania state court plaintiffs' due process rights under the 5th and 14th Amendments not to permit discovery and a hearing to determine the actual expenses borne by the Specter Firm for the production of the documents.

An essential element of "due process" is an opportunity to be heard before reaching of a judgment. L. B. Wilson, Inc. v. Fed. Communications Commission, 170 F.2d 793, 83 U.S. App. D.C. 176 (1948).

This Court in discussing the due process of law afforded by the 5th and 14th Amendments stated in Armstrong v. Manzo, 380 U.S. 545 (1965):

> . . . "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be

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[6]However, attorneys' fees are not taxable costs under Federal Law. 28 U.S.C. § 1920.

> no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, at 313. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean. 234 U.S. 385; Priest v. Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398. . ." Id., at 314. . .

Armstrong v. Manzo, 380 U.S. 545 (1965).

In direct contradiction to these holdings, the District Court ruled in response to the Maleski's discovery motion: "The Behrend Firm's arguments to the contrary [that the Specter Firm has not established its entitlement to fees pursuant to the provisions of CMO #4] are unconvincing, and do not warrant a hearing or discovery." (*See* Memorandum and Order of August 6, 2002, p.4-5). Thus, in the instant case, despite objections to the fee rate charged and to the number of hours, no hearing took place and the summary of charges at a paralegal rate of $75.00 to do a file clerk's job by the Specter Firm was approved[7]. The Third Circuit then approved this denial of due process finding that all the information necessary for the determination of the reasonableness of the fees was contained in the briefs submitted by the parties. Such a determination should not be grounds for the denial of a parties due process rights

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[7]The Behrend Firm's employee's noted that after speaking to the individual who pulled the documents, who acknowledged he was a file clerk, that in fact only a filing clerk pulled the documents, and that a paralegal did not pull any documents. Thus, to charge at $75.00 for a paralegal, when in fact it was not an individual with paralegal training, is also improper

The Third Circuit inappropriately upheld the District Court's decision to grant the Specter Firm's fee petition without hearing. In upholding the decision the Third Circuit incorrectly determined that the issue as to the propriety of the fee petition could "be adequately explored on the arguments in the briefs. (3rd Circuit Opinion at 9). In determining that this issue could properly be determined on the arguments presented in the briefs the Third Circuit and the District Court before it failed to permit the opt out litigants the opportunity to confront the Specter Firm regarding the actual cost expended and the nature of the service, as well as failed to give the opt out litigants the opportunity to review and question the Specter firm of any supporting documentation for the fees. Rather, all the Specter Firm was required to provide was a bare bones summary with no supporting backup documentation contained in the affidavit of Counsel submitted by the Specter Firm. This was not sufficient to adequately present the opt out litigants with the opportunity to challenge the fee petition.

The Behrend Firm has asserted both before the District Court and the Third Circuit that the expenses charged for document retrieval from the document depository were excessive and unsupported. In this matter, the Specter Firm requested reimbursement for its costs and accordingly, under well established law, the Specter Firm should have been charged with the burden of substantiating those costs. "Attorneys seeking compensation must document the hours for which payment is sought 'with sufficient specificity.'" Washington v. Philadelphia County Ct of Common Pleas, 89 F.3d 1037 (quoting Kennan v. City of Philadelphia, 983 F.2d 459, 472 (3d Cir. 1992)); *see also* Planned Parenthood, 297 F.3d 253, 270 n. 6 (3d Cir. 2002). Without a hearing, neither the objecting party, nor the court had any way of determining the reasonableness of the hours requested. Although the entries may reflect tasks Specter Firm undertook and the time expended, they lack the requisite specificity necessary for this Court to assess whether they are necessary and proper.

Ordinarily, a trial court finding regarding expenses is owed

great deference and reviewed on an abuse of discretion standard. However, conclusory statements concerning reasonableness are insufficient to withstand appellate review. *See* Johnson v. Hensley Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974). The Magistrate Judge in the instant case only made conclusory statements concerning reasonableness, stating only: "The Court has reviewed the affidavits submitted by the parties, an finds that the rate charged for paralegal work, $75 per hour, is reasonable."(*See* Memorandum and Order of August 6, 2002 at 4). The Magistrate Judge failed to determine whether it was appropriate for a paralegal level employee to do filing clerk work of retrieving document; was the correct actual expense charged with no profit made by the Specter Firm and was a rate of $75.00 per hour proper for payment to a filing clerk, as mandated by the applicable correct standard of review.

Thus, a court assessing a petition for attorney's fees may exclude from the lodestar amount those hours requested for inadequately described and unnecessary tasks or hours otherwise "not reasonably expended." Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983); Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3rd Cir. 1990). The United States Supreme Court advises:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. In the private sector, billing judgment is an important component in fee setting. It is no less important here. **Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.**

Hensley, 461 U.S. at 434 (citations omitted) (Emphasis added).

The Specter Firm's fee rate and hours submission to the District Court was submitted in a vague and conclusory manner, only indicating the total hours and rate without any breakdown as to the

qualifications of the individual, the rate they are paid for employment, and the hours expended for document retrieval, as supported by a time record kept on a daily basis of the days worked which indicate what work was actually performed related to this issue. *See* affidavit of Specter Firm. (9a). As it was submitted in a summary form, with only the number of hours and the hourly rate, it should have been rejected by the District Court.

With this guidance provided by the Circuit Courts on the proper standards for fee petition reviews and mandatory hearings, and based upon the fact that only a conclusory statement of information related to fee rate and the number of hours was submitted, the District Court should have permitted limited discovery requested by the Behrend Firm and conducted a hearing based upon the objections to the Specter Firm's proposed fee award.

CONCLUSION

For the above reasons, Petitioner respectfully prays that this Court grant this petition for writ of certiorari, and reverse the decision of the Third Circuit Court of Appeals and the United States District Court for the Western District of Pennsylvania. In the alternative, if this Honorable Court determines there was jurisdiction, then this Honorable Court should vacate the order of the District Court remand this case with directions to the District Court to apply the correct standard of review of "actual cost expended" and that a hearing must be held on the contested expenses.

Respectfully submitted,
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STATUTES AND OTHER PROVISIONS

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 87 - DISTRICT COURTS; VENUE

Sec. 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to

a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by -

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending. The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a

case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) (A) When a person sues or is sued as a representative of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action..

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2) (A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

the nature of the action,
the definition of the class certified,
the class claims, issues, or defenses,
that a class member may enter an appearance through counsel if the member so desires,
that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able

to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award.

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees.

A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion.

A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings.

The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge.

The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the

members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3724

SPEROS DRELLES, ESTATE OF JAMES J.DONAHUE; MARIE DRELLES;MARY CATHERINE GRAY; HOWARD HALF; GEORGE KRESOVICH; MILDRED KRESOVICH; MARY T. LASKO; GEORGIANA TOY;KENNETH TOY; CHARLES J. ABBOTT; ESSIE ADAMS; MARILYN ADAMS; DEBORAH ALSTON; JOHN D ANTONIONO ROBERT ARMSTRONG; PATRICIA AUGUSTINE; HENRY AUGUSTINE; GAY B. BANES; JOHN T. BARLEY; JOHN T. BARLEY JR.; BARBARA BARLEY PAUL BAUER; RICHARD BAUER; MADELINE BAUER; DONALD BECK; KIMBELY BECK; EARL BRAEUDIGAM; JANICE BRAEUDIGAM; OLIVE MAE BRICK; HERMAN BRICK; KATHLEEN BRYAN; ANDREW BRYAN; ROOSEVELT BYRANT; CAROL BRONOUGH; AMY L. BUCHEIT; THOMAS BURTOFT; SUSAN BURTOFT; ANTHONY CALABRESE; SHARON CALABRESE; SAMUEL CARUSO; DOLORES CARUSO; CLARENCE CLAUS; MARGARET CLAUS; SANDRA CLAWSON; JENNIFER PETERS; REX COLE; DEBORAH COLE; FRANKC. CONTINO; WILLIAM E. CROFT; DEBORAH A. CROOK; DAVID W. CUPEC; JEROME DANENBERG; GERTRUDE DANENBERG; ROBERT DANENBERG; ALVIN DAVIS; MARY DAVIS; ANDREW DENUZZIO; JEAN DENUZZIO; MARIAN E. DESANTIS; JOSEPH DILLA; KATHLEEN DILLA; KATHRYN A. DIODATI; WILHEIM DORFNER; JACQUELINE DORFNER; RENEE DRUMMONDBROWN; NANCY I. ECK; EARL FAIRMAN; JEAN FERGUSON; RANDALL FERRARI; HARRIET E. FITTS; CAROL FRAMPTON; GILBERT J. FRAUENHEIM; KATHRYN A. GIBSON; ANTHONY E. GILL; BARBARA M. GLOVER; ROY G. GOFF; ALBERT GOTLEIB; MERYL GOTLEIB; BARRY GOVERNOR; MARY GOVERNOR; STANLEY GRABOWSKI; LINDA GRABOWSKI; DALE GREENAWALD; GLORIA GREENAWALD; KARN L. GRUVER; RONALD J. GUINEY; WILLIAM A. HAFEN; JOHN P. HAMMER; MARGARET R. HAMMER; CHARLES HARPER; IRENE HARPER; LOUISE HARRIS; SARAH HART; STEPHEN

N. HAVRILLA, JR.; JOHN HELFRICH; NORA HELFRICH; JOHN HOFFMAN; LOIS HOFFMAN; DOLORES HUMENIK; EDWARD HUMENIK; STEVE HYRB; ANNA MARIE HYRB; JOHN IRWIN; VIRGINIA IRWIN; DALE JACKMAN; CONSTANCE JACKMAN; GEORGE JACKSON; MARGARET JACKSON; KENNETH JAROS; MICHAEL JOHNSON; RUBY JONES; O'NEAL JONES; MARLENE C. JONES; RAYMOND E. KALKBRENNER; FRIEDA KAMEL; JORDAN KAMPOS; SHARON LEE KAMPOS; JAMES KASICKY; ANDREW KASICKY; JOSEPH KIZIOR; DOLORES KIZIOR MILDRED P. KOBAN; MARY JO KOCHERAN-DAPOS; ROSANNA KOCIAN; DENNIS KOCIAN; ROSANNE KOCSIS; GEORGE S. KOKUS; KENNETH KOTEWICZ; EVELYN KOTEWICZ; JAMES R. KREBBEL; SHARON R. KREUER; BARBARA L. KRYNEVICH; WILLIAM V. LACY; DONALD LADESIK, JEAN LADESIK; JOHN R. LARKIN; DIANE LEBO; LUDMILLA A. LUKSIK; WILLIAM J. LUXON; RAYMOND MACKEWICH; NANCY MACKEWICH; JAMES MARAK; BONITA MARAK; MARILYN E. MERVOSH; LILLIAN Y. MERZLAK; FREDERICK MEYER; ANDREA MEYER; RUTH MILLER; WILLIAM MILLER; ALBERT MINKO; RUTH MINKO; THOMAS MOODY; MICHOLAS MOODY; JEAN MORSE; CHARLES MURPHY; BARBARA MURPHY; JAMES M. MYERS; JAMES H. MYERS; TIM McCARTHY; SANDRA McCARTHY; TERRENCE McCONNELL; JOHN McGARVEY; CINDY McGARVEY; JOHN F. McROBERTS; BONNIE SUE NEIDERHISER; MARY JEAN NEJAK; JOSEPH NIST; THEODORE ORLOWSKI; CATHERINE ORLOWSKI; RONALD ORR; KARLENE ORR; LILLIAN PARROTTO; WILLIAM PERLINGER; CRESCENZO PETRILLI; RANDY A. PFEIFER; RAYMOND PIAGESSI; ROY D. PIRAIN; MARY POLONCHAK; YVONNE BLYTHE; BARBARA J. POND; MARY JANE POTTER; ALLAN RANDOLPH; ROSEMARY RANDOLPH; HANUMANTHA RAO; STASHIA REEHER; JUDITH E. ROCKWELL; LINDA ROMANELLI; JAMES ROMANELLI; WALTER ROSE; ALNETTA ROSE; EDWARD ROSE; MARY ELLEN ROSE; SHIRLEY SACHS; FRANK J. SAMPSON; HELEN G. SCHABLIK; CHARLES SCHU; LINDA

SCHU; ELEANOR J. SCHULTZ; THOMAS SHERIDAN; KATHLEEN SHERIDAN; BONNIE SHERWOOD; GEORGE SMITH; KATHLEEN SMITH; DONNA SMORUL-KOTLINSKI; MELVIN SMULCZENSKI; LOIS SMULCZENSKI; MARY SPARICO; SAMUEL SPENCE; PRESLEY STAHL; ELIZABETH STAHL; ROBERTA STALLINGS; PRESTON STITT; ADRIENNE STITT; JOHN D. STOKES; RONALD A. STOLTZ; ROSEMARY STOYANOFF; DAVID P. SULKOWSKI; GLEN A. SULLIVAN; RICHARD L. TERHUNE; GERARD E. TERWILLIGER; LOUISE THORNTON; DONALD TOOMEY; RITA TOOMEY; DERRICK J. TUSCANO; LUCILLE TYLER; JOHN VENUS; VICTORIA MARIE VERI; THOMAS S. VIG; RITA VIG; ALVIN WEINBERG; LISA ANTIN; ALLEN WILTROUT; AGNES WILTROUT; DAVID WISE; ESTATE OF EDDIE WRIGHT; ROBERT YAUCH; JENNIE YAUCHKEITH YOUNGER; BRENDA YOUNGER,

Appellants

v.

METROPOLITAN LIFE INSURANCE COMPANY; GARY ANTONINO; JOEL SHERMAN; RONALD SHRAM; UNITED FOOD COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; BRUCE A. REZNIK ASSOCIATES, L.P.; METROPOLITAN INSURANCE AND ANNUITY COMPANY, a Delaware Corporation; JEFFREY J. RODGERS; ROBERT MARTINI; JONATHON HOLLY, Resident of Texas; JAMES SPANGLER; STEVEN ANASTASIA; THOMAS M. HYLAND; CHRISTINE DOVAN; JACK E. DUCKWORTH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

District Court Judge: The Hon. Donetta W. Ambrose
(Misc. Docket No. 96-179)

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER and GARTH*, Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/Julio M. Fuentes, Circuit Judge

DATED: February 17, 2004
tyw/cc: Kenneth R. Behrend, Esq.
Joseph N. Kravec Jr., Esq.
David J. Manogue, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3724

SPEROS DRELLES, et al,

Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

District Court Judge: The Hon. Donetta W. Ambrose
(Misc. Docket No. 96-179)

Argued: December 12, 2003

Before: AMBRO, FUENTES, and GARTH, Circuit Judges.

(Opinion Filed: January 12, 2004)

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OPINION OF THE COURT

FUENTES, Circuit Judge:

In December 1999, Metropolitan Life ("Metlife") settled a Multi-District Litigation federal class action (the "MDL" case) with plaintiffs who were represented by the firm of Specter Specter Evans & Manogue ("Specter"). Following this settlement, various litigants who had opted out of the class filed numerous lawsuits in state courts. The opt-out litigants were represented in the course of the class action and are represented in the state court proceedings by the firm of Behrend and Ernsberger ("Behrend") . In connection with the state :lawsuits, Behrend requested tens of thousands of pages of documents from Metlife as well as from a Document Depository established by the District Court pursuant to Case Management Order ("CMO") #4. Under CMO #4, Specter administered the Depository and was authorized to charge a fee.

The specific dispute here centers on Specter's production of the discovery requested by Behrend and Behrend's failure to pay the document production fee of $41,831.

Based on Behrend's refusal to pay, Specter filed a motion in the District Court to enforce CMO #4 against Behrend. The District Court, relying on CMO #4, granted Specter's motion for payment of the fees. Behrend appeals from this Order. Because CMO #4 authorizes the District Court to compel "any plaintiff obtaining documents from... the document depository" to pay the reasonable cost of producing the documents, we affirm.

I.

The facts relevant to this appeal are fairly straightforward. After the MDL settlement, Behrend began representing opt-out plaintiffs in their individual suits filed in Pennsylvania state courts against Metlife for allegedly improper sales practices. In July 2000, Allegheny County Common Pleas Judge Wettick granted a motion to compel discovery made by Behrend, but explicitly gave Metlife the option of providing Behrend the discovery directly or through the MDL case Document Depository. Metlife produced some of the documents directly, but for the remainder referred Behrend to the Document Depository, which was being administered by Specter per CMO #4. Specifically, CMO #4 dictates that when counsel for a party to an opt-out suit requests documents from the Depository, the opt-out party must pay Specter for production of such documents.

As part of discovery in the state court lawsuits, Behrend asked Specter for thousands of pages of documents. Specter produced them between August and December 2001 and then sent Behrend a bill for $41,831, a figure arrived at by billing 557.75 paralegal hours worked in retrieving the documents at $75/hour. Behrend believed that it should not have had to pay the retrieval costs, and accordingly secured an order from Judge Wettick that provided that Behrend should not bear the cost of document retrieval from the Depository. Thereafter, Specter moved (as Plaintiff) in the District Court to force Behrend (as Defendant) to pay Specter the $41,831 pursuant to CMO #4. Magistrate Judge Benson granted the motion, and the District Court affirmed. Specifically, the Magistrate Judge

held that CMO #4 precluded Specter from bearing any of the cost of the document retrieval, and that if Behrend wanted to be compensated by Metlife, it should seek such compensation in the state court venue of the opt-out litigation.

II.

A.

Behrend argues that CMO #4 does not apply because the opt-out plaintiffs were not bound by the MDL case or its settlement.[8] Behrend alternatively asserts that the Document Depository had already closed, and so its rules were no longer in effect.

Behrend's third contention is that the terms of CMO #4 itself exclude from its ambit Behrend's request for production. Finally, Behrend alleges that even if CMO #4 applies, federalism concerns should have prevented the District Court from "contravening" Judge Wettick's order that the documents be produced at no cost to Behrend.

The arguments are unpersuasive. First, the fact that the opt-out plaintiffs are not bound by the settlement is irrelevant here: the District Court has not made any rulings hampering the opt-out plaintiffs' options in their state court litigation, or foreclosing any of their claims.' Rather, the District Court has made a ruling on the application of CMO #4 to a request for production of documents from the MDL Document Depository, and nothing more. Behrend

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[8] Specter argues that the appeal is jurisdictionally infirm because it has been made in the name of the opt-out plaintiff's, rather than Behrend itself. We are not persuaded by Specter's argument because Behrend has argued that the fees involved will be charged against the opt-out plaintiffs, as the real parties-in-interest. See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) (explaining that a "party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal").

cites to a litany of cases in support of its contention that the opt-out plaintiffs were not subject to the MDL or any of its orders. Those cases, however, all deal with attempts to enjoin opt-out plaintiffs from taking certain actions in their state court proceedings. The case before us is entirely different: it concerns the District Court's enforcement of its own case management directive.

Behrend's next argument is that the Document Depository was closed in December 2000, a year after the MDL case settled. Behrend relies on the Settlement Agreement, which states: "One year after the Final Settlement Date (unless the time is extended by agreement of the Parties), Plaintiffs and their counsel shall return to Defendants' Counsel all documents . . . produced by Defendants in this Action.[9]

Appellee's Ex. A at ¶ C. Specter responds that the parties did extend the time of the depository. The continued existence of the Depository supports Specter's assertion, as does the fact that both Judge Wettick and the District Court recognized the Depository asa present institution.

Behrend's third argument is that CMO #4 does not apply to its document production request because it was made in a state court action, not an action before the District Court. CMO #4 provides that: "This Order shall apply to all actions against Metropolitan Life Insurance Company . . . that have been or may thereafter be filed in, removed to or transferred *to this Court."* App. at 312a (emphasis added). Behrend misreads the import of this passage. The passage refers to the creation of the Depository from documents in the MDL litigation, not to subsequent use of the Depository. This is made clear by the fact that CMO #4 § XII(B)(2) explicitly refers to

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[2] We have held in Drelles v. Metropolitan Life Ins. Co., Nos. 02-4037 & 02-4270, that theopt-out plaintiffs are in no way bound by the class rulings.

dealing with document requests from state-court plaintiffs, explaining that such plaintiffs must determine their entitlement to documents in their state fora before retrieving those documents from the Depository. In short, CMO #4 clearly encompasses document requests by state-court plaintiffs.

Behrend's final argument grounded in notions of federalism simply mischaracterizes the proceedings in this case. Judge Wettick's orders established three things: 1) Behrend was entitled to certain documents from Metlife; 2) Metlife had the option of referring Behrend to the depository; and 3) Behrend would not be responsible for the cost of production vis-a-vis Metlife. Judge Wettick's order, however, did not (and could not) have any effect on Specter, who was not a party to the state court litigation. Once Behrend agreed to pursue its document request from the Depository, it implicitly agreed to abide by CMO #4. As the Order clearly provides: "Counsel for *any* plaintiff obtaining documents from Defendants or the document depository as set forth above shall pay the expenses of [Specter] in producing the document ... and shall be subject to the Orders of this Court regarding the use of those documents." CMO #4 § XII(C), App. at 322a (emphasis added). Thus, Behrend's argument that the District Court lacked personal and subject matter jurisdiction is wholly without merit.

In further support of its proposition that the District Court is improperly interfering with its state-court litigation, Behrend cites to an order by the same District Court Judge rejecting a prior motion filed by Behrend in one of its state-court opt-out cases, Maleski,to compel Metlife to produce documents from the Document Depository. In the Maleski case, Behrend asked the District Court to make a discovery ruling about whether Behrend was entitled to production of certain documents. The District Court in Maleski denied Behrend's motion because it dealt wholly with evidentiary matters from the state-court litigation and, moreover, CMO #4 § XII(C) itself dictated that the state court must decide motions to compel. App. at 322a. In the case before us, in contrast, the relevant inquiry is not the propriety of certain state-court discovery, but the

proper use of the Document Depository. Specter's motion does not ask for any ruling that will affect the state-court proceedings, but merely that the Document Depository be administered pursuant to CMO #4. Thus, Maleskiis totally inapposite to the case before us.

Moreover, nothing in CMO #4 contradicts Judge Wettick's rulings or Pennsylvania law. CMO #4 simply dictates that Specter must be reimbursed for its production by the requesting party; if Behrend in turn needs to be reimbursed for that cost by Metlife, it can seek that reimbursement from Judge Wettick. In short, all of Behrend's attempts to show a federalism-based conflict lack merit.[10] Accordingly, we affirm the District Court's Order enforcing CMO #4 in Specter's favor.

B.

Behrend next argues that the District Court should have held a separate hearing to decide whether Specter's proposed $75 hourly rate was reasonable. Behrend observes that recent Third Circuit caselaw holds that an evidentiary hearing is required when the reasonable hourly rate for fees is disputed, and that failure to hold such a hearing is reversible error. Smith v. Philadelphia Hous. Auth.,107 F.3d 223, 225 (3rdCir. 1997); accord Planned Parenthood of Cent. N.J. v. The Attorney Gen. of the State of N.J.,297 F.3d 253, n. 5 (3rdCir. 2002); Lanni v. New Jersey,259 F.3d 146, 149 (3rdCir. 2001). A prior case from the Third Circuit, however, holds that "failure to conduct an evidentiary hearing ... is not reversible error....A hearing must be held only where the court cannot fairly decide disputed questions of fact without it." Blum v. Witco Chem. Corp., 829 F.2d 367, 377 (3rdCir. 1987). It is well established that in a conflict between decisions of different panels, the oldest one controls. E.g., Ryan v. Johnson,115 F.3d 193, 198 (3rdCir. 1997). Thus, the District Court's failure to hold a hearing is not automatically reversible

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[10]These points are elaborations on the well-expressed opinion of the Magistrate Judge,which was adopted by the District Court. App. at 167a-68a.

error, but rather must be evaluated under Blum.

In this case, we discern no need for a hearing: the affidavits and briefs speak for themselves, and there is no dispute as to how Specter or Behrend reached their proposed hourly rates. The only disputed issue is whether Specter should have billed the document retrieval time at a reduced paralegal rate or a file clerk rate, and that issue can be adequately explored based on the arguments in the briefs.[11]

C.

Behrend argues that the $75 hourly paralegal rate was excessive because document retrieval is file clerk labor, and file clerks generally are paid only $11/hr. Behrend insists that the $75 rate results in an impermissible profit for Specter because the document retrieval was too menial to qualify as bona fide legal work. Specter responds that the $75 rate was already discounted from the normal paralegal rate of $125/hr, and sowas eminently reasonable. The Magistrate Judge agreed with Specter, and since Behrend had not yet questioned the reasonableness of the hourly rate, the order addressed the issue in the following succinct fashion: "The court has reviewed that [sic] affidavits submitted by the parties, and finds that the rate charged for paralegal work, $75 per hour, is reasonable." App. at 168a. Although Behrend contested the hourly rate in his objections, the District Court summarily affirmed the Magistrate Judge without dealing specifically with this new argument.

We affirm the $75 rate as well within the District Court's discretion. We have carefully examined the remainder of Behrend's arguments and find them to be without merit. Consequently, we

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[11]Specter alleges that Behrend did not contest the reasonable hourly rate in the proceedings below, but Specter is incorrect. While Behrend did not bring up the issue in its original brief before the Magistrate Judge, Behrend did raise the issue in its motion and subsequent amended motion. App. at 36a, 92a.

.affirm the District Court's judgment in its entirety.

TO THE CLERK OF THE COURT:
Kindly file the foregoing Opinion.

/s/ Julio M. Fuentes

Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION	) MISC. DOCKET) NO. **96-179**) MDL NO. 1091) JUDGE AMBROSE
This Document Relates To:	) MAGISTRATE) JUDGE BENSON
ALL ACTIONS FILED BY BEHREND & ERNSBERGER, P.C.	)

ORDER

On August 6, 2002, Magistrate Judge Benson entered an order (Docket #928) granting a motion filed by the law firm Specter Specter Evans & Manogue (the Specter Firm) (Docket #898) which sought to recover from Behrend & Ernsberger, P.C. (the Behrend Firm) fees due and owing under Case Management Order No. 4. The fees were associated with the Behrend Firm's use of the Document Depository which was established in this multi-district litigation. The order also denied motions by the Behrend Firm seeking a hearing and/or discovery concerning its use of the Depository and reasonableness of the fees charged by the Specter Firm. The Behrend Firm's subsequent motion for reconsideration of the order (Docket #930) was denied (Docket #932).

The Behrend Firm has now filed "objections" (Docket #933) and a brief in support thereof (Docket #934). The Specter Firm filed a response (Docket #938) The court will treat the "objections" as an appeal from Magistrate Judge 2002 order.

AND NOW, this _____day of August, **2002,**

IT IS **HEREBY** ORDERED **that** the appeal filed by the BehrendFirm (Docket #933) is DENIED.

/s/ Donetta W. Abrose
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

cc: Joseph N.Kravec,Jr., Esquire
Specter Specter Evans & Manogue, P.C.
The 26th Floor
Koppers Building
Pittsburgh, PA 15219

Kenneth R. Behrend, Esquire
Behrend & Ernsberger
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B. John Pendleton, Jr., Esquire
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Newark, NJ 07101

cc: Joseph N. Kravec, Jr., Esquire
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	MISC. DOCKET
METROPOLITAN LIFE	)	NO. 96-179
INSURANCE CO. SALES	)	MDL NO. 1091 PRACTICES
LITIGATION	)	JUDGE AMBROSE
	)	MAGISTRATE
	)	JUDGE BENSON

This Document Relates To:
ALL ACTIONS FILED BY BEHREND
& ERNSBERGER, P.C.

MEMORANDUM AND ORDER

On August 6, 2002, the undersigned entered an order (Docket #928) granting a motion filed by the law firm Specter Specter Evans & Manogue (the Specter Firm) (Docket #898) which sought to recover from Behrend & Ernsberger, P.C. (the Behrend Firm) fees due and owing under Case Management Order No. 4 associated with the Behrend Firm's use of the Document Depository. The Behrend Firm now asks reconsideration of that order in a motion (Docket #930) and a brief filed in support thereof (Docket #931). After review of the motion and the accompanying brief, the following order is entered:

AND NOW, this 15th day of August, 2002,

IT IS HEREBY ORDERED that the "Motion for Reconsideration of Memorandum and Order Dated August 6, 2002" (Docket #930) filed by the Behrend Firm is DENIED. The Behrend Firm does, or course, have the right to file an appeal with Judge Ambrose.

/s/ Kenneth J. Benson

KENNETH J. BENSON
UNITED STATE MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	
	)	MISC. DOCKET NO. 96-179
METROPOLITAN	)	
LIFE INSURANCE	)	MDL NO. 1091
CO. SALES	)	JUDGE AMBROSE
PRACTICES	)	
LITIGATION	)	MAGISTRATE JUDGE BENSON

This Document Relates To:
ALL ACTIONS FILED BY BEHREND & ERNSBERGER, P.C.

MEMORANDUM AND ORDER

The Document Depository established in this Multi-District Litigation some years ago, and presently being maintained by LiaisonCounsel, Specter Specter Evans & Manogue, P.C. (the Specter Firm) pursuant to the provisions of Case Management Order No. 4 (CMG #4),has been a constant source of bemusement for the Behrend & Ernsberger, P.C., (the Behrend Firm) since the inception of this litigation. Presently before the court is a dispute arising from the Behrend Firm's insistence that the procedures outlined in CMO #4do not apply to its use of the Depository.

The Behrend Firm presently has approximately 200 cases pending in state court asserting claims against MetLife. The Behrend Firm sought tens of thousands of pages of documents in discovery in those case, and MetLife, pursuant to the terms of CMO#4, designated many of those documents for production from the Depository on October 27, 2000 (Docket #899, Exhibit 3). After some of those documents had been produced by the Specter Firm,

the Behrend Firm received a bill for the retrieval services rendered (Id., Exhibit 4). Kenneth R. Behrend, Esquire, wrote to counsel for MetLife on September 25, 2001, and indicated that although the state court had permitted MetLife, over his objection, discretion concerning the manner of production, he believed that he should not be charged for the production from the Depository. Rather, he suggested that the costs of production should be borne by MetLife, or, perhaps, by the Specter Firm (Id.). Mr. Behrend thereafter filed a motion to compel in the state court, wherein he sought an order directing MetLife to produce the requested documents at no cost (Id., Exhibit 5). The state court entered an order on October 12, 2001, stating that documents produced from the Depository should be made available to the Behrend Firm at no cost save for copying expenses (Id., Exhibit 6).

On January 28, 2002, the Specter Firm filed a motion in this court seeking to enforce CMO #r4, and asking for an order directing the Behrend Firm to pay $41,831.25 in professional fees, representing paralegal time expended at $75.00 per hour to retrieve documents (Docket #898). The Behrend Firm responded to the motion (Docket #909) and a filed a brief in support of that response (Docket #910). The Behrend Firm also filed a motion seeking a hearing and discovery concerning the fee dispute (Docket #911), and amended motion to that effect (Docket #913), and a renewed motion requesting discovery (Docket #924). The Specter Firm filed a reply (Docket #922) and a supplemental brief (Docket #923). The motions are ripe for disposition.

The brief filed by the Behrend Firm begins with the following paragraph:

> The Liaison Counsel's Motion calls into question whether or not this federal court may contradict the discovery orders of the Court o Common Pleas of Allegheny County. Plaintiffs were proceeding with discovery on approximately 200 cases with sales practice allegations filed in state court in Allegheny County and pursuant thereto, an order was entered in August of 2000 compelling Metropolitan Life to

> produce sales practices documents. Over the objections of the Plaintiffs, the [state] Court permitted Metropolitan Life to cho[o]se how it would produce the documents. Metropolitan Life rather than produce the documents directly, chose to obtain the documents from the MDL depository. At all times Metropolitan Life could have produced the documents directly to Plaintiffs as it eventually did pursuant to an order of court of November 2, 2001.

(Docket #910 at 1). The order referred to is a November 2, 2001 order in Inhat v. Pover, et al . ,GD 94-17455, wherein Judge Wettick, of the Court of Common Pleas of Allegheny County, Pennsylvania, directed that "all documents to De produced through the MDL depository: De made available at the offices of Behrend and Ernsberger, P.C. within 45 days of the date of this Order at no cost to the Plaintiffs." (Docket #010, Exhibit 1).

What is immediately apparent is that the Specter Firm's motion does not, in any way, ask this court to "contradict" the discovery orders entered by Judge Wettick. Indeed, Mr. Behrend himself states that MetLife was permitted, under Judge Wettick's earlier orders, to designated documents from the Depository for production. Further, neither the "no cost" order of November 2, 2001, nor the earlier "copy costs only" order of October 12, 2001, require the Specter Firm to do or to refrain from doing anything

This is unarguably so since MetLife and the Behrend Firm's clients are parties to the state court action, while the Specter Firm is not. Hence, this court need not interpret Judge Wettick's orders except to the extent that they clearly (and necessarily) do not mandate, or prohibit, any action by the Specter Firm with respect to the Document Depository or with respect to CMO #4.

Therefore, when the Specter Firm asks, as it does in its present motion, that this court enforce the provision of CMO #4, it is not being asked to "contradict" Judge Wettick's discovery orders. It is, instead, being asked only to enforce its own order. It may or may

not be, as the Behrend Firm has suggested, that Judge Wettick intends his orders to impose production costs on MetLife. That question, however, is a matter to be taken up with Judge Wettick. As between the Specter Firm and the Behrend Firm, however, and pursuant to CMO #4, and as a matter of this court's jurisdiction, the Behrend Firm must pay the reasonable costs expended by the Specter Firm in producing documents from the Depository.

The Behrend Firm raises a host of issues concerning the manner, speed and cost of production of documents by the Specter Firm. The court has reviewed that affidavits submitted by the parties, and finds that the rate charged for paralegal work, $75 per hour, is reasonable. Further, in light of the voluminous requests for production, the amount of time expended, 557.75 hours, is reasonable as well. The Specter Firm has established its entitlement to fees pursuant to the provisions of CMO :#4 in the amount of $41,831.25. The Behrend Firm's arguments to the contrary are unconvincing, and do not warrant a hearing or discovery.

An appropriate order follows:
AND NOW, this 6th day of August, 2002,

IT IS HEREBY ORDERED that the Motion of Liaison Counsel for Order Enforcing Case Management Order No. 4 (Docket #898) is GRANTED. The Behrend Firm is directed to make payment for fees in the amount of $41,831.25 FORTHWITH.

IT IS FURTHER ORDERED that the Behrend Firm's motions seeking a hearing and/or discovery (Docket #s 911, 913 and 924) are DENIED.

/s/Kenneth J. Benson
Kenneth J. Benson
United States Magistrate Judge

cc: Joseph N. Kravec, Jr., Esquire
Specter Specter Evans & Manogue, P.C.
The 26th Floor
Koppers Building
Pittsburgh, PA 15219

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B. John Pendleton, Jr., Esquire
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Newark, NJ 07101

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE	)	MISC.
	)	DOCKET NO.
	)	96-179
	)	MDL NO. 1091
METROPOLITAN LIFE	)	
INSURANCE CO-- SALES	)	JUDGE AMBROSE
PRACTICES LITIGATION	)	MAGISTRATE
	)	JUDGE BENSON

This Document Relates To:
ALL ACTIONS

CASE MANAGEMENT ORDER NO. 4

WHEREAS:

1. On May 1, 1996, this Court entered Case Management Order No. 1 ("CMO No. 1") in this action governing the case management procedures with respect to certain consolidated class actions and coordinated individual actions;

2. On December 28, 1999, this Court entered a Final Order Approving Class Action Settlement and a Final Judgment dismissing all claims set forth in the Amended Consolidated Class Action Complaint, barring further litigation arising out of or relating to the Released Transactions by Class Members who have not been timely excluded from the Class with respect to a Policy or Annuity, and barring the institution or continuation of any class action based on or relating to the claims set forth in the Amended Consolidated Class Action Complaint and/or the Released Transactions;

3. The dismissal of the Amended Consolidated Class Action Complaint makes certain procedures set forth in CMO No. 1 unnecessary; and

4. Liaison Counsel for Plaintiffs, Coordinating Counsel, Class Action Counsel and counsel for Defendants have consented to the form and entry of this Order;

IT IS, therefore, ORDERED that CMO No. 1 is vacated and superceded by the following Case Management Order No. 4:

I.

APPLICABILITY AND GENERAL PROVISIONS

A. This Order shall apply to all actions against Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company, and any of their present or former affiliates, subsidiaries, employees, agents and/or sales representatives (hereinafter "Defendants"), that have been or may hereafter be filed in, removed to or transferred to this Court alleging violations of federal and/or state law based on allegations of fraudulent life insurance and related product sales practices and/or alleging that Defendants violated federal and/or state law in wrongfully terminating employees in connection with allegedly improper and fraudulent life insurance and related product sales practices. Discovery and pretrial practices and procedures in all such actions shall be coordinated and governed by this Order. A list of actions currently pending before this Court to be coordinated pursuant to this Order is attached hereto as Exhibit A. Such actions, together with the actions described in Sections IV and V below, shall be referred to herein as the "Coordinated Actions."

B. Except as expressly set forth in this Order or in any other applicable Orders of this Court, the Court will be guided by the Manual for Complex Litigation. Thirdas approved by the Judicial Conference of the United States, as well as by the Federal Rules of

Civil Procedure and the Local Rules of Court for the United States District Court for the Western District of Pennsylvania.

C. The actions to be coordinated pursuant to this Order shall continue to be collectively referred to as "In Re: Metropolitan Life Insurance Company Sales Practices Litigation, Misc. Docket No. 96-179 and MDL No. 1091."

D. This Order is made without prejudice to the right of any party to seek a severance of any claim or action.

E. No action taken hereunder shall have the effect of making any person, firm or corporation a party to any action in which he, she or it has not been named, served or added as such.

F. Any order previously entered by this or any transferor Court that has not otherwise been modified, vacated or superceded, shall remain in full force and effect unless modified by this Court upon application, except that, in the event any order entered by a transferor court is inconsistent with this Order, the provisions of this Order shall control.

II.

MASTER DOCKET AND SEPARATE CASE DOCKETS

A. The Court shall continue to maintain a Master Docket for the pretrial proceedings both in the actions coordinated herein and in all other cases filed in, removed to or transferred to this Court and coordinated herewith for pretrial purposes. The Master Docket shall continue to be In Re: Metropolitan Life Insurance Company Sales Practices Litigation, Misc. Docket No. 96-179 and MDL No. 1091. Entries in the Master Docket shall be applicable to these Coordinated Actions as more fully set forth below. Separate dockets also shall continue to be maintained for each action, and entries shall be made therein in accordance with the regular procedures of

the Clerk of this court, except as modified by this Order or a future order of this Court.

B. When a paper is filed and the caption pursuant to Section VI infra shows that the paper is to be applicable to "ALL ACTIONS," the Clerk shall file such paper in the Master File and note such filing in the Master Docket. No further copies need be filed, nor docket entries made.

III.

MASTER FILE AND SEPARATE CASE FILES

A Master File shall continue to be maintained for the pretrial proceedings in the Coordinated Actions. The original of this Order shall be filed by the Clerk in the Master File. The Clerk shall continue to maintain a separate file for each action and filings shall be made therein in accordance with the regular procedures of the Clerk of this Court except as may be modified by Section II of this Order. The Clerk shall file a copy of this Order in each such separate file. Liaison Counsel, as defined in Section VIII below, for the respective groups of parties, plaintiff and defendant, shall mail copies of this order to counsel of record in each of the Coordinated Actions.

IV.

SUBSEQUENTLY FILED OR TRANSFERRED ACTIONS

A. When a case that relates to the same subject matter as these actions is hereafter filed in, removed to, or transferred to this Court, the Clerk of this Court shall:

1. Notify Plaintiffs' and Defendants' Liaison Counsel of the filing or transfer of such action; and

2. Make the appropriate entry in the Master Docket for the newlyfiled or transferred case.

B. When a case that relates to the same subject matter of these actions is hereafter filed in, removed to, or transferred here from another Court, Liaison Counsel for the appropriate party shall:

1. Notify all counsel for their respective groups of parties of the filing or transfer of such action;

2. Upon the first appearance of any new defendant(s), mail to the attorney(s) for the defendant(s) in such newly filed, removed or transferred case a copy of this Order; and

3. Mail a copy of this order to the attorney(s) for the plaintiff(s) in the newly filed, removed or transferred cases.

C. The Court requests the assistance of counsel in calling to the attention ofthe Clerk of the Court the filing, removal or transfer of any case which might properly be consolidated or coordinated for pretrial purposes with these actions.

V.

APPLICATION OF THIS ORDER TO SUBSEQUENTLY FILED CASES

This order shall apply to each case subsequently filed in, removed to or transferred to this Court, alleging claims similar to those set forth in the Coordinated Actions, unless a party objecting to the coordination of that case or to any other provision of this order files and serves an application for relief from this Order or from any of its provisions within thirty (30) days after the date on which the Clerk mails a copy of this order to counsel for that party.

VI.

CAPTIONS OF CASES

A. Every paper filed in these consolidated and Coordinated Actions, or in any separate action included therein, shall bear the following caption:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	MISC DOCKET
	)	NO. 96-179
	)	
METROPOLITAN LIFE	)	
INSURANCE CO. SALES	)	JUDGE AMBROSE
PRACTICES LITIGATION	)	MAGISTRATE JUDGE
	)	BENSON

This Document Relates To:

B. When a paper is intended to be applicable to a group of actions to which this order is applicable, the words "ALL ACTIONS," or such other designation as may be appropriate, shall appear immediately after the words, "This Document Relates To:" in the caption set out above.

C. When a paper is intended to be applicable only to some, but not all, of such actions, this Court's docket number for each individual action to which the pleading is intended to be applicable and the name of the first named plaintiff in said action shall appear immediately after the words "This Document Relates To:" in the caption described above, e.g. "Plaintiff Name,"Civil Action No. _____

VII.

FILING AND DOCKETING

A. When a paper is filed and the caption, pursuant to Section VI above, shows that it is to be applicable to "ALL ACTIONS," the clerk shall file such paper in the Master File and note such filing in the Master Docket. No further papers need to be filed or docket entries made.

B. When a paper is filed and the caption, pursuant to Section VI above, shows that it is to be applicable to less than all of the consolidated and/or Coordinated Actions, the Clerk shall file the original of such paper in the Master File and a copy in the file of each specified action to which the paper is intended to be applicable, and shall note such filing in the Master Docket and in the docket of each such action.

C. Any paper which is to be filed in any of these actions shall be filed with the Clerk of this Court and not with the transferor Court.

VIII.

LIAISON COUNSEL

Pursuant to Local Rule 1OO.1.E. of the Local Rules of this Court, the following counsel are designated:

A As Plaintiffs' Liaison Counsel:

SPECTER SPECTER EVANS & MANOGUE, P.C.
The 26th Floor
Koppers Building
Pittsburgh, PA 15219
(412) 642-2300

B. Plaintiffs' Liaison Counsel shall coordinate discovery among plaintiffs' counsel, whenever practicable, and act as spokesperson for plaintiffs' counsel in the negotiation of discovery issues with Defendants' counsel. Counsel for plaintiffs who disagree

with Plaintiffs' Liaison Counsel (or those acting on behalf of Plaintiffs' Liaison Counsel) or who have individual or divergent positions may act separately on behalf of their client(s) as appropriate, provided that in doing so they do not repeat arguments, questions or actions of Plaintiffs' Liaison Counsel.

C. Defendants' Liaison Counsel:

THORP, REED & ARMSTRONG
William M. Wycoff, Esq.
One Riverfront Center
Pittsburgh, PA 15222-4895

All parties shall submit to Liaison Counsel a list of attorneys for the purpose of preparation maintenance and distribution of a Master Service List. The Master Service List as of, _____ 2000 is attached hereto as Exhibit B. The Master Service List, as periodically updated, shall be maintained by the Clerk and Liaison Counsel for use in the service of any paper or order.

IX.

CONTINUING RESPONSIBILITIES OF PLAINTIFFS' CLASS ACTION COUNSEL

A. The following counsel shall continue to act as Class Action Counsel on behalf of plaintiffs with respect to the Stipulation of Settlement approved by Order of this Court dated December 28, 1999, with the responsibilities hereinafter prescribed:

SPECTER SPECTER EVANS & MANOGUE, P.C.
David J. Manogue, Esq.
The 26th Floor
Koppers Building
Pittsburgh, PA 15219
(412) 642-2300

MILBERG WEISS BERSHAD HYNES & LERACH, LLP Brad N. Friedman, Esq.
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

B. Duties and Responsibilities of Class Action Counsel.

Class Action Counsel shall have the following responsibilities and duties to perform or delegate as appropriate:

1. To undertake any responsibilities or duties set forth for Class Action Counsel in the Stipulation of Settlement or any amendment thereto;

2. To act as spokespersons at conferences relating to the Stipulation of Settlement or the administration of the Settlement;

3. To maintain the document depository pursuant to Section XIII of this Order, and consistent with the relevant provisions of the August 18, 1999 Stipulation of Settlement approved by the Court by Order dated December 28, 1999; and

4. To perform such other duties as may be expressly authorized by further order of the Court.

X.

ORGANIZATION OF PLAINTIFFS' COUNSEL IN THE INDIVIDUAL ACTIONS PENDING IN STATE COURTS

A. Behrend & Emsberger, 2400 Grant Building, Pittsburgh, Pennsylvania 15219 shall continue to serve as Coordinating Counsel for all individual actions pending in the state courts that

involve the practices alleged in the Coordinated Actions before this Court (hereinafter "Individual State Actions").

B. Coordinating Counsel shall endeavor to coordinate the efforts of the parties and their counsel in the Individual State Actions with Liaison Counsel to avoid duplicative discovery to the extent practicable.

XI.

COORDINATION OF DISCOVERY

A. All counsel shall use their best efforts to file consolidated discovery re-quests and responses where possible.

B. Written discovery obtained by any plaintiff in the Coordinated Actions shall be available to all plaintiffs in the Coordinated Actions upon request to Liaison Counsel for plaintiffs, and may be used as evidence in their respective actions to the extent permitted by the procedural, evidentiary and substantive laws applicable to the respective actions and the Orders of this Court.

C. The party who notices any deposition in any coordinated action shall interrogate first at such deposition. Depositions of witnesses in the Coordinated Actions shall be on notice to all counsel in the Coordinated Actions, and each deponent shall only be required to give testimony once except to the extent that the deponent has personal knowledge of the transactions involved in any other case. After the party who noticed the deposition has completed interrogation, other counsel in the Coordinated Actions may interrogate the witness to the extent such interrogation is not duplicative and to the extent that the witness has specific knowledge of facts relevant to that counsel's specific case. Parties may seek relief from this provision upon a showing that their failure to attend an earlier deposition of a proposed corporate deponent was not the result of neglect and that the inability to take the proposed deposition will prejudice that party's case.

D. Any party may videotape any deposition provided that the intention to do so is set forth in the deposition notice. The procedures and requirements of Local Rule 30.1 shall apply to all such depositions.

XII.

OPERATION OF THE DOCUMENT DEPOSITORY

A. Plaintiffs' Liaison Counsel have established a document depository for the use of all plaintiff parties in any Coordinated Actions and their counsel as set forth below.

Counsel for plaintiffs in each of the Coordinated Actions shall make available to Plaintiffs' Liaison Counsel for placement into the document depository all documents they obtain in discovery in those actions. Defendants shall make available to Plaintiffs' Liaison Counsel for placement into the document depository documents produced to any plaintiff in an Individual State Action that relate to sales representatives or branch offices at issue in a pending Coordinated Action.

B. Plaintiffs in any Coordinated Action seeking any document which may be in the depository shall make their request in the first instance to the Defendants, as follows:

1. Plaintiffs' Liaison Counsel's database relating to depository documents shall be available to plaintiffs in the Coordinated Actions. Upon review of the database, a plaintiff in a Coordinated Action seeking documents from the depository must provide a list of requested documents to MetLife and its counsel at the addresses set forth in Section XIII B below. Plaintiffs' Liaison Counsel may not produce copies of the requested documents until 30 days have elapsed from the date the written request is received by MetLife and its counsel. If MetLife objects to any such request, it shall serve its objections on plaintiff's counsel and Plaintiffs' Liaison Counsel. The parties shall meet and confer in an effort to resolve any such objection before seeking resolution from the

Court. If motion practice is necessary, the Court may, in its discretion, order *in camera* review of the disputed documents in order to resolve the objection. No production shall be made until the parties have resolved the objection or the Court has so ordered.. Any counsel in a Coordinated Action obtaining documents from the depository pursuant to this paragraph shall sign an undertaking in the form annexed hereto as Exhibit C stating that (a) they have read and understood the provisions of this Order and of the Protective Order and Amendment to Protective Order in this action and will abide by the terms of those Orders; and (b) that they will not use the documents for any purpose in any state court action or any other federal court action or administrative proceeding.

2. Plaintiffs in Individual State Actions must serve discovery requests in the ordinary course of discovery proceedings in their individual actions. Defendants may object to the production of any documents to the requesting plaintiff, who then must seek relief in the appropriate court. In the event no objection is made, Defendants shall either (1) produce the requested documents to plaintiff; or (2) acknowledge that the requested document is in the depository, identify the document by Bates number, and authorize the custodian of the depository to produce that document, and that document alone, to the requesting plaintiff. This procedure is more fully set forth in this Court's Order of March 19, 1999 and those provisions are incorporated herein by reference.

C. Counsel for any plaintiff obtaining documents from Defendants or the document depository as set forth above shall pay the expenses of Defendants or Plaintiffs' Liaison Counsel in producing the document, including reasonable copying costs, and shall be subject to the Orders of this Court regarding the use of those documents. Nothing in this Ordershall be construed to require that the Federal Rules of Civil Procedure govern the scope of any discovery response or request in any state court action.

XIII.

SERVICE OF PLEADINGS AND OTHER PAPERS

A. All pleadings, motions, memoranda, opposition and other papers for all actions before the Court shall be served upon plaintiffs by hand or overnight delivery to Plaintiffs' Liaison Counsel. For papers relating to the class action settlement, Defendants must serve Class Action Counsel by hand or overnight delivery. Plaintiffs' other counsel may be served by regular mail. All counsel in individual actions must be served with all papers related to their cases.

B. Except when otherwise agreed, Plaintiffs' counsel shall serve the following of Defendants' counsel by hand or overnight delivery with any pleadings, motions, memoranda, opposition and other papers: William M. Wycoff, Thorp, Reed & Armstrong, One Riverfront Center, Pittsburgh, PA 15222-4895; A. Kaiper Wilson, Metropolitan Life Insurance Company, Law Department, Area 6E, One Madison Avenue, New York, NY 10010-3690. Defendants' other counsel may be served by regular mail.

C. Responses to all contested motions, other than dispositive motions, shall be due no later than twenty-one (21) days from the date of receipt of the Motion. A reply to a response to any motion may be filed no later than ten (10) days following the receipt of the response. Responses to any dispositive motion shall be due no later than thirty (30) days from the date of receipt. These times may be extended by Stipulation or Order of Court.

XIV.

ADMISSIONS PRO HAC VICE

All attorneys for plaintiffs and Defendants in the Coordinated Actions who are members in good standing of their respective Bars may appear and participate in this matter pro hac vice without further order of the Court. Counsel who appeared in a transferor Court prior to the transfer need not enter a separate appearance before this Court.

XV.

SCHEDULING WITH RESPECT TO CERTAIN CASES

In individual policyholder suits, any motions to transfer or otherwise on the basis of the injunction entered in Horton v. Metropolitan Life Insurance Co., CIV No. 93-1849 CIV-T-23A (M.D. Fla.), shall be filed, together with a brief, within twenty (20) days of the date of this order. In the case of any individual policyholder cases that may hereafter be filed in, transferred to, or removed to this court, any such motion to transfer and brief shall be filed within twenty (20) days of either: service of the complaint, in cases filed in this court, filing of the notice of removal, or service by the Clerk of the notice of assignment required by part IV A of this Order, above.

Responses to any such motions shall be due twenty (20) days after service of the motion and brief. Replies shall be filed only upon leave of court; oral argument of any motions shall only be upon leave of court.

XVI.

MISCELLANEOUS

A. Counsel for all parties are directed to cooperate with one another, whenever possible, to promote the expeditious handling of pretrial proceedings in the Coordinated Actions.

B. Any exchange or disclosure of information or documents between or among counsel for plaintiffs or between or among counsel for Defendants in connection with the Coordinated Actions shall not be construed as a waiver of any attorney-client, work product or other privilege.

C. All subsequent Case Management Orders issued in these proceedings shall be numbered consecutively. Any reference to an order of this Court in any document filed with the Court shall include the proper number of the Order.

D. This order may be amended by the Court on its own motion, and any party may apply at any time to this Court for a modification or exception to this Order.

E. Copies of Notices of Deposition shall be submitted but not filed with the Clerk directly to the court. This requirement is for the Court's information only.

ENTERED this 27th day of June 2000 at Pittsburgh, Pennsylvania

/s/ Donetta W. Ambrose
Donetta W. Ambrose
United States District Judge

Service of this order to be made by counsel for Metropolitan Life Insurance Co.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	MISC. DOCKET
	)	NO. 96-179
	)	MDL NO. 1091
METROPOLITAN LIFE	)	
INSURANCE	)	
CO. SALES	)	JUDGE
PRACTICES LITIGATION	)	AMBROSE
	)	MAGISTRATE
	)	JUDGE
	)	BENSON

This Document Relates To::)
ALL ACTIONS)
_____)

I,_____, hereby certify that I have read and understood the provisions of Case Management Order No. 4, the Protective Order dated May 1, 1996 and the Amendment to Protective Order dated March 6, 1997 in this action, and that I will comply with those Orders. I further certify that I will not use any documents obtained from the document depository or any information obtained from databases maintained by Plaintiffs' Liaison Counsel relating to the document depository in this action in any state action or any other federal action or administrative proceeding.

Date: